

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

MICHAEL CODA, individually, and on
behalf of all others similarly situated,
Plaintiff,

v.

CONSTELLATION ENERGY POWER
CHOICE, LLC.,
Defendant.

: HON. JOHN MICHAEL VAZQUEZ, U.S.D.J.
: HON. MARK FALK, U.S.M.J.
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: Civ. Action No. 2:17-cv-03437 (JMV)(MF)
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DEFENDANT’S NOTICE OF SUPPLEMENTAL AUTHORITY

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Defendant Constellation Energy Power Choice, LLC (“Constellation”) respectfully submits this Notice of Supplemental Authority to advise the Court that its recent decision in *Marshall v. Verde Energy USA, Inc.*, No. 18-1344, 2019 WL 1254562 (D.N.J. Mar. 19, 2019), attached hereto as Exhibit A, provides further support for Constellation’s Motion to Dismiss the Amended Class Action Complaint (ECF No. 35).

Specifically, this Court dismissed Marshall’s consumer fraud claim because Verde Energy did not promise savings to plaintiff, *id.* at *4, despite Marshall’s month-by-month comparison of Verde Energy’s variable rates to PSE&G’s rates and “wholesale rates” showing that Verde charged 80% more than PSE&G during several months.¹ This Court’s holding supports dismissal of Plaintiff’s consumer fraud claim in this case – which is based on allegations of much smaller variances from PSE&G rates (20-30% in most months, with a high of 42% in one month) – because, as this Court previously found, Constellation’s Agreement with Plaintiff similarly contained no promise of savings or competitive pricing. *See* Opinion, ECF. No. 28, at 5, 11 (June 29, 2018).

The Court also dismissed Marshall’s breach of contract claim because the contract, like the Constellation Agreement, did not guarantee savings or competitive pricing and did not obligate Verde Energy to base its rates on wholesale market conditions, market rates, or other ESCO’s rates. *Marshall*, 2019 WL 1254562, at *5; *see* Opinion at 14 (finding that the Constellation Agreement does not guarantee savings or competitive pricing and provides a non-exhaustive list of factors, which are not limited to wholesale costs and competitive rates, that Constellation may consider when calculating the variable rate).

¹ *See* Complaint ¶¶ 33-34, in *Marshall v. Verde Energy USA, Inc.*, No. 18-1344, (D.N.J. filed Jan. 31, 2018).

Additionally, this Court dismissed Marshall's good faith and fair dealing claim because "the Complaint appears to allege that Plaintiff's monthly invoices contained PSE&G's monthly rate, which would have permitted him to make an easy comparison with Verde's rate," and thus the competitiveness (or lack of thereof) of Verde's rates "was not hidden from Plaintiff." *Marshall*, 2019 WL 1254562, at *5. This Court's holding supports dismissal of Plaintiff's good faith and fair dealing claim in this case, which relies on similar allegations concerning PSE&G's Price to Compare showing that Plaintiff could also easily compare Constellation and PSE&G's rates each month.²

For these reasons, and those stated in Constellation's Motion to Dismiss and Reply brief, Plaintiff's First Amended Complaint should be dismissed with prejudice.

² *Compare* First Amended Class Action Complaint ¶ 29 nn.1-2 (alleging that "PSE&G's contemporaneous rate for commodity supply is also commonly known as the 'Price to Compare,'" and explaining that Plaintiff could not provide the "Price to Compare" for one month because he was "unable to locate the page" of his monthly invoice containing that information) *with* Complaint ¶¶ 33 n.5, in *Marshall v. Verde Energy USA, Inc.*, No. 18-1344, (D.N.J. filed Jan. 31, 2018) (alleging that pleaded "Utility Rate" is "the 'Price to Compare' provided on Plaintiff's billing invoices").

/s/ Elizabeth J. Sher

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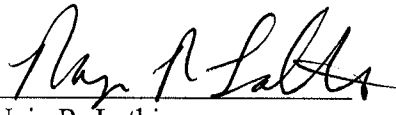
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Dated: March 21, 2019

CERTIFICATE OF SERVICE

I hereby certify that the within Notice of Supplemental Authority was electronically filed with the Clerk of the United States District Court for the District of New Jersey via ECF, and that copies were served on plaintiff's counsel by ECF.


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